86-2022

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and THE UNITED STATES OF AMERICA, ILLINOIS CENTRAL GULF RAILROAD COMPANY, and IOWA NORTHERN RAILWAY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In the opinion of petitioners International Brotherhood of Electrical Workers,* the following question is presented by this petition:

Whether a union, whose members are affected by proceedings before an administrative agency, and whose members, as well as the union itself, were represented before the agency by an association of which the union's chief executive is in turn a member, has standing to seek judicial review of the agency's decision under 28 U.S.C. § 2344?

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* The following parties participated in the petition before the court of appeals; the International Brotherhood of Electrical Workers, the Interstate Commerce Commission and the United States of America. The Interstate Commerce Commission and the United States of America were also respondents in a petition which was consolidated with the instant case. The petitioners in that case were: Packard Elevator, Farmers Cooperative Society, Incorporated, Farmers Cooperative Elevator (Marble Rock, IA), Farmers Coop (LaPorte City, IA), Farmers Coop Elevator (Manly, IA), Shell Rock Elevator Company, Gilbertville Milling Company, Mount Auburn Grain Company, Union Coop, Rock Falls Grain Company and Iowa Northern Railway Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES OF AMERICA,
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
and IOWA NORTHERN RAILWAY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The International Brotherhood of Electrical Workers ("IBEW") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals dismissing IBEW's petition for review of a decision of the Interstate Commerce Commission ("ICC" or "Commission") is reported at 808 F.2d 654 (8th Cir. 1986), and is reproduced

herein as Appendix A.[1] The court's decision denying IBEW's petition for rehearing is not reported and is reproduced herein as App. B.[2] The decision of the ICC, from which IBEW appealed is not reported and is reproduced herein as App. C. The separate judgment of the court of appeals is reproduced as App. D.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1986. A petition for rehearing was denied on January 22, 1987. On April 13, 1987, Justice Blackmun granted petitioner's request for an extension of time in which to file this petition, to and including June 21, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the application of 28 U.S.C. § 2344 which provides, in pertinent part:

> On the entry of a final order reviewable under this chapter the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States.
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> * * * *

28 U.S.C. § 2344 is reproduced herein as App. E.

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[1] The Appendix will hereinafter be referred to as "App."

[2] IBEW's petition was consolidated with the appeal in *Packard Elevator Farmers Cooperative Society, Inc., et al. v. ICC*, No. 85-2517 which was dismissed at the request of the petitioners in that case. App. A at 3a. Accordingly, the IBEW is the only remaining challenger to the ICC's decision. IBEW believes that the petitioners in that action have no interest in the outcome of this petition, but IBEW has served them with copies of the petition in accordance with Rule 19.6 of the Rules of this Court.

STATEMENT

1. The ICC decision which was the subject of IBEW's appeal concerned a request by the Chicago, Central & Pacific Railroad Co. ("CCP") for exemption of its acquisition of a railroad line and trackage rights from the Illinois Central Gulf Railroad Co. ("ICG") from certain requirements of the Interstate Commerce Act. 49 U.S.C. § 10101, *et seq.* App. C. The IBEW is a "representative" of certain employees of the subject railroad line within the meaning of Section 1 Sixth of the Railway Labor Act, 45 U.S.C. § 151 Sixth. The President of the IBEW is a member of the Railway Labor Executives' Association ("RLEA") which represented the interests of the organized ICG employees in the proceedings before the ICC. App. C at 9a.[3] In those proceedings, RLEA argued that as a condition of its approval of the subject transaction, the ICC should require that CCP and/or ICG provide arrangements for the protection of employees adversely affected by the transaction. The ICC granted the exemptions sought by the CCP and denied RLEA's request that employee protection arrangements be required as a condition of the ICC's approval of the transaction. App. C at 24a-26a.

When the RLEA decided not to challenge the ICC's decision, the IBEW itself initiated a review proceeding in the Court of Appeals for the Eighth Circuit on behalf of its members who were affected by the transaction. The Eighth Circuit dismissed IBEW's petition to review concluding that IBEW lacked standing to challenge the ICC's decision under 28 U.S.C. § 2344 because it was not a "party aggrieved" by the ICC's decision, within the meaning of that Section. App. A at 4a. The Court below

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[3] The RLEA is a voluntary association of the chief executive officers of nineteen (19) national labor organizations, including the IBEW which collectively represent virtually all of the organized railroad employees in the United States. *Railway Labor Executives' Association v. ICC*, 735 F.2d 691, 692 (2d Cir. 1984).

based the dismissal on the decisions in *Simmons v. ICC*, 716 F.2d 40 (D.C. Cir. 1983) and *American Trucking Ass'n v. ICC*, 673 F.2d 83 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), in which it was held that in order to obtain judicial review under Section 2344 of an action by an administrative agency, a petitioner must have participated in proceedings before the agency. The Eighth Circuit also relied heavily on the decision in *American Civil Liberties Union v. Federal Communication Commission*, 774 F.2d 24 (1st Cir. 1985), in which it was held that participation of a national organization in administrative proceedings was not sufficient to give local affiliates of that organization, aggrieved party status within the meaning of Section 2344. App. A at 3a-4a.

The IBEW sought rehearing but that request was denied. App. B at 6a.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit had no doubt that RLEA would have had standing to seek judicial review as a party aggrieved by the ICC's decision. App. A at 5a. However, it concluded that IBEW could not obtain review of the ICC's decision even though IBEW's President is a member of RLEA, and RLEA represented the interests of IBEW's members before the ICC. The Eighth Circuit's decision misinterpreted and misapplied Section 2344 as well as precedent regarding that Section. Because Section 2344 is an important statute governing judicial review of decisions by a wide variety of administrative agencies, the decision below will have significant ramifications for practice before all administrative agencies. Accordingly, this Court should grant the petition for writ of certiorari.

Moreover, if the Eighth Circuit's decision is allowed to stand, it will greatly undermine the concept of "representational" or "organizational" standing and will burden the administrative decision-making process. Under

the reasoning of the court below, members of organizations which represent the collective interests of their membership will forfeit their individual rights to challenge an agency's decision in the courts of appeals unless they intervene in the administrative proceedings and participate along with the organizations. Accordingly, the decision will greatly reduce the incentive for individuals with common interests, who are members of organizations whose purposes are to promote those interests, to participate in administrative proceedings through those organizations. The result will be a multiplicity of redundant appearances, pleadings and testimony. The IBEW submits that this result would be inconsistent with well established principles of representational standing and with the basic purpose of 28 U.S.C. § 2344.

1. It is beyond dispute that the employees affected by the ICG-CCP transaction were entitled to participate in the ICC proceedings; and it is well established that those employees were entitled to participate in those proceedings collectively through their unions or through RLEA. *E.g.*, 49 U.S.C. § 10328(a); *accord, Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342-3 (1977); *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Brock*, 106 S. Ct. 2523, 91 L.Ed.2d 228 (1986); *National Treasury Employees Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 911 (D.C. Cir. 1984). Furthermore, it is settled that unions have standing to seek review of an agency's decision under Section 2344 as "aggrieved parties," based upon the interests of their members. *National Treasury Employees Union, supra* at 910; *Rockford League of Women Voters v. United States Nuclear Regulatory Commission*, 679 F.2d 1218, 1221 (7th Cir. 1982).

In the instant case, the IBEW members affected by the ICG-CCP transaction were represented by RLEA which spoke for all of the employees represented by the

organizations whose officers are RLEA members.[4] The Eighth Circuit implicitly recognized that RLEA would have had standing to petition for review under Section 2344 because it represented the affected employees in the ICC proceedings. App. A at 4a-5a. However, it held that IBEW, the representative of some of those same employees, and an RLEA member organization, lacked standing because it did not separately represent those employees in the ICC proceedings. This conclusion is premised upon a misinterpretation of Section 2344 and precedent under that provision.

First, it is important to recognize that Section 2344 states only that a "party aggrieved" by an administrative agency's decision may obtain review of that decision; the provision itself does not define "party aggrieved" nor does it expressly require participation in the administrative proceedings as a prerequisite for a petition for review.[5] However, several courts of appeals

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[4] This Court has recognized that the RLEA has standing to assert the interests of the members of the labor organizations of which its own members are the chief executive officers in ICC proceedings and in appeals from ICC decisions. *American Trucking Ass'n v. United States*, 355 U.S. 141, 144 (1957), *citing*, *Brotherhood of R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519 (1942). Obviously, since neither RLEA nor the individual rail labor organizations are institutionally affected by the transactions considered by the ICC, it is clear that its standing to challenge ICC decisions is solely derivative of the interests of the affected employees.

[5] Indeed, it has been recognized that Section 2344 does not preclude appeals by individuals who had no opportunity to participate in administrative proceedings. *National Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 601 n.42 (D.C. Cir. 1981); *Pacific Gas and Electric v. Federal Power Commission*, 506 F.2d 33, 46 (D.C. Cir. 1974). Additionally, the Third Circuit has stated that a minor who is an American citizen has standing under § 2344 to appeal the deportation of her alien mother, even though the child did not participate in proceedings before the Immigration and Naturalization Service. *Martinez de Mendoza v. INS*, 567 F.2d 1222 n.1 (3rd Cir. 1977); citing *Acosta v. Gaffney*, 553 F.2d 1153 (3rd Cir. 1977).

have held that "party aggrieved" means an individual who participated in the administrative proceedings, noting that Section 2344 differs from the Administrative Procedure Act, 5 U.S.C. § 702, which permits appeals by any "person aggrieved" by an agency's action. *See e.g., Simmons v. ICC*, 716 F.2d 40, 42-43 (D.C. Cir. 1983); *American Trucking Ass'n, Inc. v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982); *ACLU v. FCC*, 774 F.2d 24, 25 (1st Cir. 1985). It is those cases on which the Eighth Circuit relied in dismissing IBEW's appeal. App. A at 3a-4a. However, review of those decisions, and the precedent on which they relied, reveals that the Eighth Circuit applied the rule in those cases too broadly, and that the reasoning of those cases actually supports IBEW's standing to bring the instant appeal.[6]

All of the decisions relied upon by the Eighth Circuit refer to the D.C. Circuit's decision in *Gage v. AEC*, 479 F.2d 1214 (D.C. Cir. 1973). *See American Trucking*, 673 F.2d at 84; *Simmons*, 716 F.2d at 42; *ACLU*, 744 F.2d at 26.[7] In *Gage*, while holding that an individual must generally participate in administrative proceedings in order to obtain judicial review of an agency's action, the court noted that it is arguable that if a petitioner who did not participate at the agency level had no way to challenge the agency's action except by seeking judicial review, and if the petitioner's failure to participate was justifiable, the petitioner "could bring an action for 'direct' review of the [agency action]. For example, *if any party had been entrusted to represent petitioners' interests* but had after [the agency action] 'dropped the

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[6] IBEW also notes that while a petition for writ of certiorari was denied in *American Trucking*, this Court has never ruled on the question of standing to bring an appeal under Section 2344.

[7] Indeed in *Simmons*, the D.C. Circuit referred to the definition of a party aggrieved as a participant in the administrative proceeding for which review is sought, as the "*Gage* rule." *Simmons*, 716 F.2d at 42-43.

cudgel' they might be entitled to petition for review." 479 F.2d at 1221 n.23 (emphasis added), citing *Easton Utilities Commission v. AEC*, 424 F.2d 847, 853 (D.C. Cir. 1970). In *Easton* the D.C. Circuit recognized that a petitioner who did not participate in agency proceedings might have standing to seek judicial review of the agency's action under Section 2344 when there was a representational relationship between the petitioner and a party who had participated at the administrative level. 424 F.2d at 853.[8] Thus, all of the cases relied upon by the Eighth Circuit in turn relied on *Gage* in which it was recognized that in circumstances such as in the instant case, there is good reason not to preclude a petition for review. And none of those cases involved a situation in which a petitioner who did not participate in administrative proceedings was represented in the agency proceeding by another party who decided not to appeal from the agency's decision.

Additionally, the decision in *ACLU*, on which the Eighth Circuit principally relied, expressly recognized that it was appropriate to preclude petitions for review by local ACLU chapters which had not participated in administrative proceedings on the challenged agency ac-

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[8] The Court in *Easton* cited *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953) and *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944), in which it was held that an individual who was not a party in a district court action, but was represented in that action, had standing to bring an appeal of the district court's decision. *See also, United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

The D.C. Circuit in *Simmons, supra*, also recognized the analogy to rules regarding appeals from district court decisions noting that the *Gage* rule "establish[ed] the same requirement with regard to direct appeals from agency orders as exists with regard to appeals from district court decisions." 716 F.2d at 43. Surely if a petitioner, who was not a party in a case in the district court, may appeal an adverse decision if that individual participated in the district court through a representative, then the same rule should apply to petitioners who participate in administrative proceedings through a representative.

tion *because the parent national organization was already challenging the agency's action in the Court of Appeals.* Thus, the First Circuit stated that the local ACLU chapters did not "contend that [the national] ACLU is incapable of competently and aggressively representing either affiliate during the review process." 774 F.2d at 26, citing *Gage*, 479 F.2d at 1221 n.23.[9] Additionally, the instant case is unlike *ACLU* because in that case local affiliates which did not participate in administrative proceedings sought to intervene as parties to an appeal of the agency's decision solely on the basis that their parent organization participated in those proceedings. By contrast in this case, the IBEW petitioned for review of an agency's decision as the representative of employees who participated with the IBEW in the administrative proceedings through a different, but related representative, RLEA. Thus, here the true parties in interest, the employees, are not recent entrants to the controversy but rather have been involved in this matter from the beginning.

Furthermore, in the instant case, unlike *Simmons* and *American Trucking*, and in direct contrast with *ACLU*, although the petitioner, IBEW, did not directly participate in proceedings before the ICC, it participated through its representative, RLEA; and IBEW now seeks judicial review *because its representative has decided not to bring an appeal.* The situation in this case is analogous to the situation posited in *Gage*, and the situations in the appeals from district court decisions referred to in *Easton*, in which the party representing the petitioner "dropped the cudgel." Here IBEW seeks to pick up the

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[9] That the ongoing presence of the ACLU national organization in the appeal, and its adequacy as a representative of the local ACLU chapters, were significant factors in the First Circuit's decision is further demonstrated by the First Circuit's subsequent decision in *Clark & Reid Co., Inc. v. United States*, 804 F.2d 3 (1st Cir. 1986) in which the *ACLU* decision was described as "dismissing members from appeal in part because they were adequately represented by their organization." *Id.* at 6.

cudgel which it, through RLEA, was carrying, and to pursue this matter in the Court of Appeals. Accordingly, the *Gage* rule is not a bar to IBEW's standing in the court of appeals, and the Eighth Circuit erred in dismissing IBEW's petition for review. Because this erroneous decision has broad implications for the rights of individuals who participate in administrative proceedings through representative organizations, the Court should grant the petition for writ of certiorari.

2. The Eighth Circuit's decision is also inconsistent with well-established precedent regarding representational standing. The RLEA's participation in the ICC's proceedings was premised upon 49 U.S.C. § 10328(a) which provides that "[d]esignated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees." This Court has held that under the statute from which this provision is derived, RLEA had standing before both the ICC and the courts as the representative of employees affected by transactions under the Interstate Commerce Act. *American Trucking Ass'n, supra*, 355 U.S. at 144. However, the RLEA itself does not represent individual employees affected by the transaction, rather it is a voluntary association which represents its own members, the chief executive officers of the rail unions which directly represent the affected employees. Thus, under Section 10328(a), the individual unions can participate in ICC proceedings and in appeals from those proceedings because of the interests of their members; and the RLEA can participate in those proceedings and appeals as representative of its own members. Accordingly, when RLEA appears, all of the unions whose officers are its members appear and their members, the affected employees, appear. Thus, IBEW participated in the ICC proceedings through the RLEA and it therefore is a "party aggrieved" by the ICC's decision, within the meaning of Section 2344.

Additionally, the Eighth Circuit's decision ignores the fact that the employees affected by the ICG-CCP transaction certainly participated in the ICC proceedings (through their representative RLEA). Had those individual employees sought to appeal the ICC's decision because RLEA had decided not to appeal, they would have had standing under Section 2344 by virtue of their actual interests in the transaction and the participation of RLEA. Therefore, since the employees affected would have had standing to seek review of the ICC's decision because they participated in the administrative proceedings then, under *Hunt*, and *International Union, United Automobile Workers, etc.* the IBEW must have standing as the representative of those employees to seek judicial review of the decision.

Because the dismissal of this appeal is thus inconsistent with precedent of this Court regarding organizational standing, and will have a significant effect on the ability of organizations to bring petitions for review on behalf of their members, the instant petition for writ of certiorari should be granted.

3. Finally, it is apparent from the above discussion of the effect of the Eighth Circuit's decision on the ability of members of organizations which represent their interests before administrative agencies to preserve their rights to appeal under Section 2344, and its effect on the rights of such individuals to participate in administrative proceedings through such organizations, that if the decision is allowed to stand it will have serious consequences for practice before administrative agencies. In order to avoid forfeiting their ultimate rights to petition for review of an agency's decisions, members of organizations which participate in administrative proceedings will likely intervene in such proceedings and perhaps even submit their own statements of position and testify in agency hearings.

With regard to practice before the ICC, this would mean not only that all 19 organizations whose officers

are members of RLEA will intervene in its proceedings, but also that many of the subordinate union General Committees, or employees themselves who are affected by the matter before the ICC might intervene, since participation by their representative would not protect their individual rights to seek review of the ICC's decisions. Petitioner submits that such massive intervention would significantly burden the ICC, and other administrative agencies, hindering their ability to timely resolve the cases before them. By contrast, if this Court reverses the court of appeal's decision, membership organizations will continue to be able to effectively represent the collective interests of their members and those members would be secure in their ability to pursue their own interests, should the organizations decide, for whatever reasons, not to appeal adverse decisions by administrative agencies. Accordingly, for very practical reasons of effective operation of administrative agencies, as well as for the purely legal reasons set forth above, the Eighth Circuit's decision should be reviewed.

CONCLUSION

For all of the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: June 22, 1987

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2517

PACKWOOD ELEVATOR, FARMERS COOPERATIVE SOCIETY, INCORPORATED, FARMERS COOPERATIVE ELEVATOR (Marble Rock, IA), Farmers' Coop Elevator (LaPorte City, IA), Farmers Coop Elevator (Manly, IA), Shell Rock Elevator Company, Gilbertville Milling Company, Mount Auburn Grain Company, Vinton Coop, Rock Falls Grain Company,

and

IOWA NORTHERN RAILWAY COMPANY,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

No. 86-1014

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
AND THE UNITED STATES OF AMERICA,
Respondents,

ILLINOIS CENTRAL GULF RAILWAY COMPANY,
Intervenor-respondent.

Petition for Judicial Review of Decision of Interstate Commerce Commission

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Submitted: February 12, 1986

Filed: December 24, 1986

Before McMILLIAN, JOHN R. GIBSON and FAGG, Circuit Judges.

McMILLIAN, Circuit Judge.

I. Appeal No. 85-2517

On December 24, 1985, Packard Elevator, Farmers Cooperative Society, Inc., Farmers Cooperative Elevator (Marble Rock, IA), Farmers Coop Elevator (LaPorte City, IA), Farmers Coop Elevator (Manly, IA), Shell Rock Elevator Co., Gilbertville Milling Co., Mount Auburn Grain Co., Vinton Coop, Rock Falls Grain Co., and Iowa Northern Railway Co. (petitioners) filed a petition for review of a decision of the Interstate Commerce Commission (ICC) *Chicago, Central & Pacific R.R.—Purchase (Portion), Trackage Rights, & Securities Exemption*, Finance Docket No. 30663 (Dec. 24, 1985) (ICC decision). Petitioners also requested an emergency stay pending judicial review; a temporary stay was granted on December 24, 1985. On December 27, 1985, following oral argument by telephone conference call, the temporary stay was vacated and the motion for stay pending judicial review was denied. *Packard Elevator v. ICC*, No. 85-2517 (8th Cir. Dec. 27, 1985) (order). On January 17, 1986, an opinion was issued by the court setting forth its reasons for the denial of the stay. *Packard Elevator v. ICC*, 782 F.2d 112 (8th Cir. 1986).

Subsequently by letters dated September 30, 1986, and October 8, 1986, petitioners requested that their petition for judicial review be dismissed because a settlement had been reached. This request is granted and Appeal No. 85-2517 is dismissed.

II. Appeal No. 86-1914

On January 6, 1985, the International Brotherhood of Electrical Workers (IBEW) filed a petition for review of the same ICC decision which was the subject of Appeal No. 85-2517. IBEW's petition for review was consolidated with Appeal No. 85-2517, and oral argument was heard on February 13, 1986. IBEW's petition is now before the court for decision.

We consider first whether IBEW has standing to petition for judicial review of the ICC decision. By order of this court following oral argument, the parties filed supplemental briefs on this issue.

Title 28 U.S.C. § 2344 (1982) provides that a party aggrieved by a final order of the administrative agency may within sixty days after entry of the order file a petition for judicial review of the order of the United States Court of Appeals. Courts have construed the phrase "party aggrieved" to mean that a person seeking judicial review must have participated in the proceedings before the administrative agency. In *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983), the court dismissed the petition for review of an ICC ruling because the petitioner had not been a party to the proceedings before the ICC. The court noted that it had consistently interpreted the phrase "party aggrieved" to require participation at the agency level prior to the issuance of an agency order. *Id.* at 42; *accord American Trucking Ass'n v. ICC*, 673 F.2d 82, 84 (5th 1982), *cert. denied*, 460 U.S. 1022 (1983). The court rejected petitioner's argument which equated "party aggrieved" to "person aggrieved" and eliminated the requirement of participa-

tion at the administrative level. *Id.* at 43. We are persuaded that the District of Columbia Circuit's interpretation of "party aggrieved" is correct and therefore hold that participation before the agency is required.

IBEW argues that even if there is such an administrative level participation requirement, the requirement was met in the present case by the participation of the Railway Labor Executives Association (RLEA) at the agency level. IBEW makes three arguments in support of its contention that it participated in the agency proceedings. First, IBEW argues that RLEA participated in the proceedings before the agency and served as the designated representative for all affected rail employes and labor associations before the ICC, including IBEW. Second, IBEW argues that it submitted an affidavit to the ICC which outlined the adverse effects on represented employees that would result from the carriers' proposed actions. Third, IBEW argues that the decision in *ACLU v. FCC*, 774 F.2d 24 (1st Cir. 1985) (ACLU), is not dispositive in the present case because unlike the American Civil Liberties Union in *ACLU* which sought judicial review of the decision, RLEA did not seek judicial review in this case.

While each of the above arguments urged by IBEW has some surface appeal, any extended discussion of these arguments is unnecessary and would unduly lengthen this opinion. Because we firmly believe that the First Circuit's decision in *ACLU* was correctly decided, we reject each of IBEW's arguments.

In *ACLU* the First Circuit considered whether participation of a national organization was sufficient to give the local affiliates of that same organization "aggrieved party status" under 28 U.S.C. § 2344. The First Circuit rejected the local affiliates' arguments that they were "aggrieved parties" because their interests were represented by the American Civil Liberties Union in the administrative proceedings. 774 F.2d at 25. The

court held that such a broad interpretation of the statute would be contrary to congressional intent to limit the number of persons entitled to petition for review and would result in a "dramatic expansion of the number of persons entitled to petition for review." *Id.*

We reach the same conclusion in the present case. IBEW did not participate in the proceedings before the ICC. Neither the participation of RLEA nor the submission of an affidavit by an IBEW member in support of RLEA's position constitutes participation by IBEW in this administrative proceedings. IBEW could have participated in the proceedings before the ICC, thereby insuring that its interest would receive judicial review. The fact that RLEA chose not to request judicial review and the resulting inability of IBEW to secure judicial review of the ICC decision presents no compelling reason to ignore congressional intent. *Id.* at 26.

Relying on *Wales Transportation, Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984) (*Wales*), IBEW lastly contends that it has standing to request judicial review because the decision of the ICC was beyond the scope of its authority and therefore judicial review may be sought by any person. In *Wales*, the Fifth Circuit recognized an exception to the agency participation requirement and permitted a non-party to the ICC proceedings to challenge the ICC's jurisdiction to issue truck leasing rules. *Id.* Assuming that such an exception does exist, IBEW's conclusory statement that the "ICC exceeded its statutory authority by entertaining the application under Section 10901" is insufficient to bring IBEW within this exception. IBEW offers no facts or support for this bald statement. Accordingly, we conclude that IBEW lacks standing to seek judicial review and Appeal No. 86-1014 is dismissed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2517

PACKARD ELEVATOR, *et al.*,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 86-1014

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Judicial Review of
Interstate Commerce Commission

Petitioner's petition for rehearing has been considered by the Court and is denied.

January 22, 1987

Order entered at the Direction of the Court:

/s/ [Illegible]

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30663

CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY—
PURCHASE (PORTION), TRACKAGE RIGHTS,
AND SECURITIES EXEMPTION

Decided: December 20, 1985

Served: December 24, 1985

BACKGROUND

Chicago, Central & Pacific Railroad Company (CCP), a noncarrier, seeks an exemption under 49 U.S.C. 10505 from (1) the requirements of 49 U.S.C. 10901 to permit it to acquire a 679-mile line of railroad and trackage rights from Illinois Central Gulf Railroad Company (ICG), and (2) the requirements of 49 U.S.C. 11301 to permit it to issue securities. The exemption request will be granted.

In a decision served September 17, 1985, we found that the questions raised by the requested exemptions could not be resolved without the institution of this proceeding. See Ex Parte No. 400, *Modification of Proc. for Handling Exemptions Filed Under 49 U.S.C. 10505* (not printed), served December 29, 1980. CCP supplemented the record and various parties, including shippers, public bodies, and members of the public filed statements of support.[1] ICG and Cedar Valley Railroad Company (CV) filed comments. Opposing comments were filed by labor interests,

[1] Most supporters' statements were neither verified nor served on the parties. They raise no legal or factual issues and will not be considered in detail.

the Iowa Northern Railway Company (IANR), a competing rail carrier, and shippers. CCP and ICG replied.

The line runs 510 miles from Chicago, IL, to Omaha, NE, with a 128-mile branch from Tara to Sioux City, IA, and a 41-mile branch from Manchester to Cedar Rapids, IA.[2] The trackage rights to be acquired extend over ICG lines in the Chicago switching district from Hawthorne Yard, Cicero, IL, (1) 28 miles to ICG's classification yard and LMX intermodal yard, and (2) 43 miles to the Commonwealth Edison (Edison) power plant at Plaines Station, IL.

The purchase price is $75 million. This includes the line and certain equipment[3] and facilities.[4] CCP expects to issue up to $90 million in debt and equity securities to General Electric Credit Corporation and/or other financial institutions to finance acquisition of these and other capital assets (primarily equipment) and to provide working capital.

CCP is a noncarrier corporation formed to acquire and operate the line. Its president, John E. Haley, holds qualifying shares of common stock. Mr. Haley also owns a majority of the stock of CV, a class III carrier operating a north-south line in Minnesota and Iowa that intersects the ICG line at Waterloo. Mr. Haley placed his CV stock in a voting trust under 49 C.F.R. Part 1013 on June 4, 1985.

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[2] The main line includes approximately 6 route miles in Cedar Rapids and Waterloo, IA, to be acquired from the Waterloo Railroad Company, a wholly-owned ICG subsidiary. ICG will retain trackage rights over a short track segment in the Chicago, IL switching district.

[3] CCP will purchase 30 locomotives, 410 hopper cars, 500 boxcars, and 30 cabooses.

[4] These facilities include a locomotive and car repair and maintenance plant at Waterloo, an office structure at Waterloo (for corporate and operating headquarters), and various other stations and facilities of the line.

IANR is a class III rail carrier operating a 144-mile north-south line between Cedar Rapids and Manly, IA. It intersects the ICG line at Waterloo. The IANR segment north of Waterloo lies about 15 miles west of the CV line and competes directly with CV. IANR's submission includes verified statements from its president and two consultants.

The majority of IANR's stock is owned by the shippers it serves. The shareholder-shippers are represented by Shell Rock Valley Shippers Association and Northeast Iowa Shippers Association (collectively referred to as Shippers Associations). The Shippers Associations' joint pleading included verified statements of five grain elevators on the IANR.

IANR and the Shippers Associations generally contend that CV engages in predatory pricing. They fear the CCP will also engage in predatory pricing as IANR's competitor and otherwise will favor CV over IANR as a connecting carrier. They seek to impose certain conditions to protect IANR's traffic.

Railway Labor Executives' Association (RLEA)[5] and United Transportation Union (UTU) represent the interests of ICG employees on the line. Essentially, they contend that ICG employees will be adversely affected by the transactions. Assertedly, they will lose the benefit of the labor protective conditions that they are entitled to in their employment with ICG, and the proposed trackage rights will eliminate ICG jobs.

Protestants argue that the voting trust is invalid or ineffective to insulate Mr. Haley from control of CV.

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[5] RLEA submitted verified statements from representatives of three of is member unions: Sheet Metal Workers International Association (SMWIA), International Associaiton of Machinists and Aerospace Workers (IAM), and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC).

As such, they assert that the transaction is governed by 49 U.S.C. 11343 and subject to mandatory labor protective conditions and mandatory consideration of competitive interests. Alternatively, they seek the imposition of traffic conditions. RLEA and UTU argue that, in any event, the trackage rights are governed by section 11343. Finally, protestants contend that the proposal does not meet the exemption criteria of section 10505.

PROCEDURAL MATTERS

1. IANR seeks leave to file additional evidence after the due date for its statement. Assertedly, the tendered evidence, bearing on CV's competitive practice, was not previously available and when it became available was submitted with diligence. CCP does not object and instead addresses the merits of the additional evidence in its reply. The evidence is accepted because no delay or prejudice will result.

2. IANR seeks leave to file a supplemental verified statement in response to CCP's reply, and RLEA seeks leave to reply to the replies of ICG and CCP. The parties contest certain factual assertions in the respective replies. We will accept the pleadings because they will not prejudice the interests of the parties.

3. IANR moves to strike portions of CCP's verified rebuttal statement as new evidence beyond the scope of previous reply statements. The evidence pertains to CCP's working capital commitments and projected first year revenues. Since these matters were first raised by IANR, rebuttal is appropriate, and the motion is denied.

4. UTU, RLEA, and IANR move to reopen, under 49 C.F.R. 1115.3, our decision served November 14, 1985, denying CCP's motion for a protective order and instead conditioning access on the execution of a confidentiality agreement. IANR states that it declined to execute the confidentiality agreement. It argues that the confiden-

tiality condition violates Commission regulations at 49 C.F.R. 1150.4(a) that require the production of documents in an application proceeding under 49 U.S.C. 10901 without regard to claims of privilege. IANR and UTU argue that the confidentiality requirement impairs their ability to participate because their respective spokesmen, as witnesses, cannot review the discovered documents, and because the filing and serving of responsive evidence based on the discovered material would itself be a breach of confidentiality. RLEA also notes that the November 14th decision was flawed because it granted access to CCP's documents through November 7, 1985. RLEA requests that the date for access be extended.

The regulations pertaining to a section 10901 application have no bearing on an exemption proceeding. Moreover, IANR's contention that the information is of public concern is not supported by *Application Proc.—Construct., Acq. or Oper. R. Lines*, 365 I.C.C. 516, 521-22 (1982) [Application Procedures], which does not preclude a protective order for application materials. The importance of preserving the confidentiality of proprietary information supersedes the burdens a party may experience in employing consultants and crafting appropriate responses. In addition, evidence can be filed under seal to protect confidentiality. 49 C.F.R. 1104.14. Petitioners' motion to reopen is denied.

The confidentiality agreement proposed by the Commission's November 14 order is identical to that used in all proceedings where proprietary information is relevant. It forecloses disclosure to employees of competitors to prevent the information being used to the detriment of the applicant. Petitioners have not, in fact, been treated differently from other protesting parties before the Commission. Petitioners have not shown any special circumstances or need to warrant different treatment as to confidentiality, nor did they tender an offer of proof as to specific factual issues such information would tend to establish.

RLEA's motion for an extension of the access period is also denied. We will not further delay this proceeding. The record indicates that petitioners neglected to seek timely clarification and otherwise failed to protect their interests by executing a confidentiality agreement and demanding access to the sought materials. CCP did not deny access and petitioners did not make an offer of proof as to relevance. Accordingly, petitioners are primarily responsible for any resulting prejudice against them.

5. CCP requests expedited handling. It asks that a decision be isued by December 15, 1985, and made effective on its service date to permit its participation in the fall grain harvest, performance of track rehabilitation before the onset of bad weather, and generation of revenues to offset current transaction costs.

IANR replied. It argues that the proceeding has been protracted because of CCP's contumacy over discovery, and should not now be expedited solely to benefit CCP. Furthermore, IANR seeks to preserve its opportunity to seek a stay, which would not be available if the decision were made effective immediately. Without a stay, IANR argues, it faces a greater burden on appeal because 49 U.S.C. 10505(d) empowers the Commission to revoke an exemption only if regulation is necessary to carry out the rail transportation policy. On the other hand, if the decision to exempt is stayed, the Commission may reconsider all of its findings. Finally, IANR argues that if the acquisition goes forward, success on appeal would only void the transaction and could not, as a practical matter, restore the parties to their prior condition.

The request for a December 15, 1985 deadline is inconsistent with the deliberate process and is denied. The decision may be made effective immediately because IANR's administrative and judicial remedies are adequate without a stay. Its speculative concerns about undoing the transaction are outweighed by the financial

burden imposed on CCP by further delay. Finally, the revocation power in section 10505(d) meets IANR's needs because the market power arguments advanced by IANR also relate to elements of the rail transportation policy.

DISCUSSION AND CONCLUSIONS

Voting Trust: Contrary to protestants' arguments concerning the effectiveness of the voting trust, the acquisition of the line falls under section 10901 because CCP is a noncarrier. *See Application Procedures, supra* at 518. *Cf.* Finance Docket No. 30505, *Alabama So. R.R. Co., Inc., and the Ala. Gt. So. R.R. Co.—Acq., Oper., and Trk. Rts.—Exemp.* (not printed), served August 30, 1984 (*Alabama Southern*). The voting trust issue and whether it effectively insulates Mr. Haley from control of CV relates only to whether Mr. Haley must seek authority for common control under section 11343 at this time. A section 11343 application would mandate a consideration of the interests of competing carriers and the imposition of labor protective conditions under 49 U.S.C. 11347.

Protestants contend that the trust is illusory and a sham designed to help ICG escape its labor protection obligations. They point to paragraph 8(b), which terminates the trust if control of CV by Mr. Haley is subsequently approved or exempted from regulation. Even if the trust is valid, protestants argue that Mr. Haley remains in control of CV. They allege that Mr. Haley represented CV in labor negotiations and met with the president of CV while the voting trust was in effect. They infer control from the alleged inexperience of the present CV management and from the selection of the trustee whom they allege is incapable of independent decision making because it is a small, local bank in a community financially dependent on CV.

We find the trust valid. The Commission regulations at 49 C.F.R. 1013.2(b) and (c) specifically contemplates

the termination of a voting trust when control by the settlor is approved. We have previously held that a voting trust is a temporary device designed to avoid a technical violation of the law, and not a device for holding stock on a permanent basis. *See Water Transport Assn. —Pet. for Decl. Order*, 367 I.C.C. 559 (1983). A similar voting trust arrangement was approved by us in Finance Docket No. 30439, *Gulf & M. R.R. Corp.-Purch. (Portion)—Ex.—I.C.G. R.R.Co.* (not printed), served January 2, 1985 (*G&M*).

We do not find any merit in the allegations that Mr. Haley continues to exercise control over CV. Apparently, Mr. Haley's appearance in CV's labor negotiations occurred in May of 1985, before the trust's June 4, 1985 consummation date, and the meeting with CV's president was held at the behest of the Governor of Iowa and was not contrary to the terms of the trust. CCP contends that CV's current president and board chairman are independent and aggressive managers, and notes that they have been extremely successful. It maintains that the trustee bank meets all the requirements of 49 C.F.R. 1013.1(c), has a good reputation in the community, and can be expected to exercise independent judgment because of its interest in the success of the endeavor. CCP's responses are satisfactory answers to the allegations of irregularity and the innuendoes regarding the trustee and CV's management.

To ensure that the voting trust remains a temporary device, we will require Mr. Haley to seek approval or exemption to acquire common control of CV within 1 year of CCP's acquisition of the previously described rail assets from ICG.

Trackage Rights: Under *Alabama Southern*, trackage rights acquisitions are governed by section 10901 and not by section 11343 where they are to be acquired by a noncarrier, or they are *de minimis* and incidental to a

section 10901 acquisition.[6] We need not address the contentions of RLEA and UTU that section 11343 governs the acquisition of trackage rights involved at Hawthorne because CCP is a noncarrier.

When a noncarrier simultaneously acquires a line and trackage rights that are either not limited or not incidental, section 10901 continues to apply but the trackage rights acquisition must be independently justified under section 10505.[7] CCP contends that the trackage rights it seeks to acquire are limited and incidental. Assertedly, the Hawthorne-to-Markham trackage rights will save substantial transit time and car hire charges by giving it direct access to ICG's Markham and IMX yards for interchange with other carriers. The Hawthorne-to-Plaines trackage rights will allow CCP to deliver coal trains to Edison without an ICG switch.

UTU contends that the trackage rights are too long to be "limited", and are not incidental because they extend CCP into a new territory. It claims that direct CCP service to Plaines will result in a loss of 10 ICG jobs and will be less efficient because ICG will continue to switch BN coal trains to Edison.

In our supplemental *G&M* decision, we determined that trackage rights are incidental where, they primarily serve to promote the success of the acquisition and maintain efficient connecting operations. The proposed trackage rights meet this test, and the length is comparable to

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[6] In *G&M* (supplemental decision served May 13, 1985), we exempted from section 10901 the acquisition by a *rail carrier* of approximately 38 miles of trackage rights as an incident to its prior section 10901 acquisition of a rail line.

[7] In the supplemental *G&M* decision, we made independent findings with regard to the rail transportation policy of 49 U.S.C. 10101a and held that a limited and incidental finding is equivalent to a finding of limited scope. As to market power, however, we simply applied our findings from the prior decision exempting the acquisition of the line.

that in *G&M*. Accordingly, we find that for purposes of the exemption criteria, the acquisition of the line and trackage rights are a single transaction.

Traffic Protection: IANR and the Shipper Associations generally contend that CV now engages in predatory pricing. They fear that CCP will engage in similar predatory practices and that CV will obtain an unfair competitive advantage through a friendly connection with CCP at Waterloo. IANR contends that it has operated at a loss since CV began operations. Previously its operations were marginal, but in the first 6 months of CV's operations, IANR assertedly lost more than $300,000 (including depreciation). It has since raised its rates, imposed a surcharge, and entered into numerous contracts. These actions have reduced its losses and improved its cash flow, but the shippers' profit margins have suffered. IANR seeks trackage rights over CCP's line from Waterloo to barge loading terminals at Dubuque, IA, and East Dubuque, IL, and to an interchange with the BN for access to warm-water ports.[8]

CCP states that IANR already has access to the Mississippi River via four interchange points with three carriers (including ICG at Waterloo). It notes that

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[8] IANR also seeks a reciprocal switching arrangement to all industries to be served by CCP in Waterloo-Cedar Falls and in Cedar Rapids and to all industries within the scope of the DT&I conditions imposed on ICG in Finance Docket No. 24907, *Illinois Cent. G. R.R. Co.—Control—Waterloo R.R. Co.* (not printed), served June 24, 1968). Since IANR does not now have reciprocal switching arrangements with ICG, none are necessary to protect its traffic. Nevertheless, CCP has indicated its willingness to enter into reciprocal switching arrangements where economically feasible.

Iowa Department of Transportation (IADOT) seeks to reroute IANR over 6 miles of CCP track in Waterloo-Cedar Falls to avoid interruption of IANR operations when the State of Iowa constructs U.S. Highway 18 in the area. Since CCP has agreed to this use, and more importantly since it is not related to the acquisition, we need not consider it as a condition.

IANR interchange traffic with ICG at Waterloo was minimal both before and after creation of CV. According to ICG, it constituted no more than 15 percent of IANR's grain traffic. CCPR has offered to enter into identical rate allowance and division agreements with IANR and CV.

The Iowa Association of Rail Passengers (IARP) opposes trackage rights and favors an agreement on divisions. It attributes the financial problems of IANR and its shippers to the depressed agricultural economy and not to CV's pricing policies. Moreover, it contends that predatory pricing is unlikely given the limited resources of CV and CCP.

Notwithstanding its limited past use of the Waterloo interchange, IANR argues that CV's friendly connection with CCP there will deny IANR the ability to compete. Assertedly, CV has a history of establishing line-haul grain rates below variable cost. IANR introduces evidence demonstrating that shippers will travel up to 45 miles further by truck for a 5 cent per bushel differential at an elevator. It fears that the elevators on IANR's northern segment will be bypassed for those on the parallel CV line. IANR also fears that CCP will use similar rate practices to preempt IANR's movement of grain traffic. IANR estimates that CCP is losing between $400,000 and $1 million per year (depending on actual expenditures for track and derailments). Assertedly, CV must carry between 6,500 and 8,600 freight cars per year to cover these losses, but moved only 2,174 cars in its first 5½ months of operation. The shortfall, IANR argues, can be made up only by diverting traffic from IANR.

IANR refined its analysis based on a draft IADOT Railroad Analysis Update purportedly showing that, in 1984, CV reported revenues of $263,000 and expenses of $558,000 on the origination and termination of 667 cars. IANR contends that the resulting revenue to expense

ratio of 47 percent clearly establishes predatory pricing. Moreover, IANR contends that the revenue figures suggest that ICG is subsidizing CV beyond the purported division of $125 per car. Specifically, CV's rate to Waterloo is between $50 and $70 per car on 60 and 75 car trains, but it earned an average of $394 per car. A subsidy assertedly would enable CV to pursue a predatory pricing policy.

IANR introduces statements from several shippers who support protective conditions. Grain elevators on the Chicago and North Western Transportation Company (CNW), on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and the IANR (including members of the Shippers Associations, and elevators that are not IANR shareholders) indicate that they have lost substantial business to elevators on the CV and have had to cut their profit margins to the break-even point to attract business. Scoular Grain Company, located on the ICG, conditions its support of CCP's acquisition upon the maintenance of access by competing carriers. Two shippers favor switching arrangements in Waterloo and Cedar Falls because they are dissatisfied with ICG rates and routing.

Finally, IANR contends that the agreement on rate allowances and divisions proposed by CCP is simply a bilateral agreement stating a schedule of divisions. Because CV would not be a party to the agreement, IANR argues that the agreement would not prevent CCP from discriminating in favor of CV.

In reply, CCP disputes the Commission's statutory authority to grant a conditional exemption. Relying on *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984) (*Brae*), it argues that section 10505 is not a restructuring tool. Furthermore, it argues that the imposition of conditions would be inconsistent with affirmative findings under the exemption criteria. We disagree. While section 10901 does not specifically authorize pro-

tective conditions (compare section 11343-44), the Commission has substantial ancillary powers to take actions consistent with statutory authority as a legitimate, reasonable, and direct adjunct to statutory power. *See, e.g., Trans Alaska Pipeline Rates Cases*, 436 U.S. 631 (1978).

CCP argues that its offer of identical divisions and allowances is adequate to protect IANR's interests. As to IANR's allegations of predatory pricing by CV, CCP notes (1) that CV is a separate entity; (2) that this proceeding is not the proper forum for granting IANR relief from the speculative prospect of unlawful actions by CCP; and (3) that CV has not engaged in predatory pricing. In this regard, CV's president notes that the expenses shown on the IADOT report include start-up costs, and that CV had a positive net operating income in its first year.

CCP's reply reveals a 1984 IADOT report showing that 80 percent of Iowa's grain that moves to the Mississippi River ports moves by truck. Based on this intense truck competition and the availability to IANR of alternative rail connections for river traffic, a competitor cannot price predatorily (*i.e.*, reduce prices to eliminate competition, and then raise prices to monopoly levels). Moreover, the record does not establish that any predatory pricing actually has occurred or will occur with or without common control of CCP and CV. That CV expenses exceeded revenues during its first few months of operation clearly does not establish a case for predatory pricing as claimed by IANR. The record does not establish that shippers have or will be likely to experience any abuse of market power as a result of this transaction. Further, there is no evidence that CCP will follow CV's alleged predatory pricing practices (which we see as competitive, not predatory), that competition will be lessened, or that IANR will be denied the opportunity to compete. Accordingly, there is no basis for imposing conditions on the acquisition.

Purchase and Trackage Rights Exemption: Under section 10505(a), we must exempt a transaction from regulation if we find that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and (2) either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

1. Protestants contend that regulation of the transaction under section 10901 is necessary under five elements of the rail transportation policy:

i. To ensure the development and continuation of a sound rail transportation system. 49 U.S.C. 10101a(4).

Relying on the steps that it has taken with regard to financing, labor, management, insurance, equipment, connecting carriers, and shippers, CCP contends that regulation of the transaction is unnecessary and that detailed scrutiny under section 10901 would add nothing of significance to the record. It contends that vigorous intermodal and intramodal competition exists in the markets to be served and that its service will benefit shippers by spurring competition.

IANR argues that the limited financial and traffic data submitted by CCP are inadequate to demonstrate financial viability, a necessary finding in a section 10901 proceeding. *See Application Proc.-Construct., Acq. or Oper. R. Lines*, 365 I.C.C. 236 (1981). They assert that this requirement carries over into exemption proceedings.[9] RLEA contends that the proposal is the latest step in an ICG program of dividing its system into independent segments. RLEA argues that this fragmentation will result in a less efficient transportation system.

We find that regulation is unnecessary under section 10101a(4). We reject IANR's contention that the ele-

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[9] IANR cites *Brae, supra*, generally in support of this proposition, but does not develop this argument. In reply, CCP argues that *Brae* is inapposite as it involved an exemption from 49 U.S.C. 10705a. 740 F.2d at 1046.

ments of a section 10901 application are required in an exemption from that section. In our September 17, 1985 decision we pointed out that the lack of fixed evidentiary requirements in an exemption proceeding enhances regulatory flexibility. In fact, CCP has shown a thoroughly planned approach to this enterprise. This, coupled with the financing commitments CCP has obtained, lead us to conclude that the line under CCP management will be financially viable. The record before us is sufficient to show that further inquiry is unnecessary.

ii. To ensure that transportation facilities are operated without detriment to public health and safety. 49 U.S.C. 10101a(8).

Aside from financial viability, IANR also argues that evidence of operational viability is lacking. It argues that Mr. Haley's ownership of the line could jeopardize public safety. It refers to the testimony of record to show that Mr. Haley has limited experience in managing rail operations; that the line under ICG handled over 2,000 carloads of hazardous materials per year; and that CV under Mr. Haley has had several derailments in its first year of operation.

In response, CCP states that it is not CV, that it is employing experienced ICG personnel to operate the line, that it has negotiated innovative work rules with rigorous safety standards, that it has obtained adequate casualty and liability insurance, and that it has budgeted significant expenditures for rehabilitation.

The record demonstrates that the persons most directly connected with public safety, the operating employees and supervisors, will remain unchanged. Further inquiry is unnecessary particularly since IANR has not cited any credible evidence to be obtained in a section 10901 proceeding that would support its safety allegations under section 10101a(8).

iii. To encourage honest and efficient management. 49 U.S.C. 10101a(10).

In response to allegations challenging honesty and efficiency, CCP contends that it will be subject to all provisions of law and that it has assembled a team of qualified managers, mainly from ICG ranks. RLEA points out that the only managers specifically identified are John Haley and Michael J. Connor, a vice president, but does not indicate how regulation under section 10901 will achieve better managerial efficiency. Managerial prowess is not germane to a section 10901 application. In any event, the opponents have not offered reliable evidence to impugn the qualifications of CCP's management team. To the contrary, the evidence indicates that in a relatively short time Mr. Haley guided the CV into a viable competitive position and now proposes to do the same for the CCP with a management team experienced on the very line that will be operated.

iv. To encourage fair wages and safe and suitable working conditions. 49 U.S.C. 10101a(12).

RLEA contends that the record is devoid of evidence as to what CCP's wages rates and work rules are. Furthermore, although CCP purportedly will draw its workforce from on-line ICG employees, RLEA states that the selection process ignores seniority, exposes nonselected employees to layoffs, and does not include heavy maintenance and repair employees whose work will be contracted out.

CCP states that it has initiated labor agreements with the two largest ICG labor organizations and is negotiating with all other labor representatives. Assertedly, the agreements provide for fair and innovative wages and specific arrangements to ensure safe and fair working conditions. It avers (1) that any on-line ICG employees not initially hired will receive preference in future hiring; (2) that its labor contracts provide for wages that meet or exceed existing rates; and (3) that its initial employees will retain their ICG seniority dates and their ICG service will be credited for vacation purposes. CCP's

labor program is fully responsive to RLEA's allegations and goes beyond any requirements that would otherwise be imposed. In addition, CCP has *executed* labor agreements with the brotherhood of Railroad Signalmen, the Brotherhood of Locomotive Engineers, the Brotherhood of Railway and Airline Clerks, and the United Transportation Union.

v. To prohibit predatory pricing and practices. 49 U.S.C. 10101a(13).

In our discussion of traffic protective conditions, we rejected IANR's contentions of predatory pricing. We found that there was no evidence that CV had engaged, or CCP would engage, in predatory pricing and, more importantly, we found that the competitive climate would prohibit predation. Accordingly, application of section 10901 to this transaction is unnecessary under 49 U.S.C. 10101a(13).

We conclude that our detailed scrutiny under section 10901 is unnecessary to further the goals of the rail transportation policy. On the contrary, exemption of this transaction will promote the above considerations and, in addition, will minimize regulation, expedite decisions where regulation is not necessary, and reduce regulatory barriers to entry.

Because only a change in ownership is contemplated and because the line is only a small part of the rail transportation system, CCP argues that the transaction is of limited scope. However, we find it unnecessary to decide the "limited scope" issue because we find that regulation of the transaction is not necessary to protect shippers from the abuse of market power. The record demonstrates that there is pervasive intramodal and intermodal competition on grain movements from the affected area to the Mississippi River barge terminals. Moreover, CCP's analysis of the rail traffic historically moved on the line demonstrates that most of this traffic can be moved competitively because its movement is character-

ized by low tonnages and short distances or because it was exempted from regulation based on a prior Commission finding of pervasive competition. Certain parties have argued that they have been denied discovery necessary to present their position. From the record before us we do not believe this to be the case.

In our initial evaluation of confidentiality asserted by application prior to our decision authorizing disclosure under protective conditions we had opportunity to review materials protestants sought to discover and add to their argument. The principal case presented by the opponents is that the CCP's acquisition of the relevant ICG lines will result in an abuse of market power. They contend that this will occur because CCP will engage in predatory pricing, as they allege CVAR has. As our previous discussion has shown, we doubt that traffic that CCP will handle will be subject to a predatory pricing strategy.

Labor protection: Imposition of labor protective conditions under section 10901 is discretionary. Although we are exempting this transaction under section 10505, we cannot use our exemption power to relieve a railroad of its labor protection obligations. 49 U.S.C. 10505(g).

CCP argues that the Commission has a judicially-approved policy of not burdening a new carrier with labor protective conditions under section 10901. UTU, on the other hand, alleges that it is ICG who will benefit from a denial of labor protection. It points out that the Commission has, in similar circumstances, imposed the cost of labor protection on the vendor. *See Prairie Trunk Ry.—Acq. and Oper.*, 348 I.C.C. 832 (1977).

The RLEA unions describe the impact on their respective members. SMWIA contends that CCP is not committed to hiring 450 ICG workers; it only "expects" to. SMWIA argues that ICG employees now furloughed will never be recalled; that nonselected ICG employees will be

furloughed; and that off-branch maintenance work will be lost when ICG sells its locomotives to CCP. IAM adds that employees who move to CCP may lose certain contractual rights, and that high-seniority employees on furlough will lose all chance of recall when their home-points are abolished.[10] BRAC estimates that 85 jobs will be lost on the line, as well as 30-50 support positions in Chicago and Mobile, AL. Labor interests asks that we impose the conditions in *New York Dock Ry.—Control—B.E.D.T.*, 360 I.C.C. 60 (1979), *aff'd. sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2nd Cir. 1979).

ICG estimates that 6 years of labor protections for the 74 employees not selected by CCP would cost $18,932,000, based on a weighted average annual wage and benefit cost of $42,640 per employee. If required to protect the 450 employees taken by CCP, ICG estimates an additional potential liability of $115,128,000. Both ICG and CCP agree that a potential liability of this magnitude would abort the $75 million transaction.

ICG adds that the unions have exaggerated the impact of the acquisition on employees. It contends that CCP's hiring lists include furloughed employees, and it notes that no sheet metal workers and only six machinists work on the line. Assertedly, the clerks are protected by other labor agreements.

In reply, RLEA contends that the cost estimates are exaggerated and questions whether imposition of labor protection will jeopardize the transaction. In any event, it construes ICG's fears of substantial financial exposure as a tacit admission that workers on the line will be significantly disadvantaged by the transaction. Finally, it questions the effectiveness of the other labor agreements cited by ICG. The merger protection agreement,

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[10] The employees have point seniority only.

for example, contains a clause allowing a reduction in force in the event ICG's business declines. RLEA does not calculate the effect of this clause.[11] substantial burdens, with the additional costs of labor protection. *See e.g., Matters of Chicago, M., St. P. & Pac. R. Co.*, 658 F.2d 1149 (7th Cir. 1981).

The evidence in support of labor protective conditions is insufficient to cause us to deviate from our policy of not burdening newly-formed acquiring carriers, who already face substantial burdens, with the additional costs of labor protection. *See e.g. Matter of Chicago, M., St. P. & Pac. R. Co.*, 658 F.2d 1149 (7th Cir. 1981).

Moreover, we find no justification on the record for imposing labor protective conditions on ICG or for requiring ICG to pay the cost of such conditions imposed on CCP. On the contrary, the evidence shows that employees on the ICG line will be hired by CCP immediately or will be given preference in later CCP hirings, or will be substantially protected by ICG should they choose to remain there. Accordingly, no labor protective conditions will be imposed.

Securities: CCP expects to issue to General Electric Credit Corporation and/or other financial institutions (a) debt instruments or securities with a face amount of up to $65 million, and (b) $10 million in redeemable preferred stock with detachable warrants permitting acquisition of a noncontrolling portion of CCP common stock.[12] CCP expects to issue up to $15 million in additional securities to finance its acquisition of additional capital assets (primarily equipment) and to provide working capital.

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[11] RLEA also argues that CCP's collective bargaining agreements are not relevant to the need for labor protective conditions. We have not considered CCP's labor agreements in this context.

[12] Presumably, CCP will also issue common stock to create a controlling interest and to cover the warrants. Its *pro forma* first year balance sheet, prepared in response to an RLEA interrogatory, shows no equity value for common stock.

Since the nature of the debt instruments is not specified, we will exempt CCP's securities issuance only to the extent that it is subject to our regulation under section 11301. We note also that, in our October 16, 1985 voting conference in Ex Parte No. 397, *Exemption of Railroads from Securities Regulation under 49 U.S.C. 11301*, we voted to exempt as a class all securities issuances by class II and III carriers. Individual action here is necessary only because the decision in Ex Parte No. 397 is not yet effective.

Our detailed scrutiny of the securities issuance is not necessary to carry out the rail transportation policy. Granting the exemption will minimize regulation, expedite decisions where regulation is not necessary, and reduce regulatory barriers to entry. Furthermore, the issuance of securities does not subject shippers to an abuse of market power.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. Pursuant to 49 U.S.C. 10505, we exempt Chicago, Central & Pacific Railroad Company from the requirements of (1) 49 U.S.C. 10901 with respect to the acquisition from Illinois Central Gulf Railroad Company of the above described 679-mile line of railroad and trackage rights in the Chicago switching district; and (2) 49 U.S.C. 11301 with respect to the issuance of not more than $90 million in debt and equity securities, all subject to the condition subsequent that Mr. Haley seeks approval or exemption for common control of CV within one year of CCP's acquisition of the previously described rail assets from ICG to ensure that the voting trust remains temporary.

2. Notice will be published in the Federal Register.

3. This decision is effective

By the Commission, Charles Gradison, Vice Chairman Simmons, Commissioners Taylor, Sterrett, Andre, Lamboley and Strenio.

James H. Byrne
Secretary

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1014

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,
Respondents.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Intervenor/Respondents.

Petition for Judicial Review
of an Order of the
Interstate Commerce Commission

JUDGMENT

This petition for review was submitted on the administrative record of the Interstate Commerce Commission, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the International Brotherhood of Electrical Workers lacks standing to seek judicial review and the cause is hereby dismissed in accordance with the opinion of this Court.

December 24, 1986

A true copy:

ATTEST: /s/ Rozert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.

CERTIFIED COPIES ISSUED: JANUARY 29, 1987

APPENDIX E

STATUTES RELIED UPON

28 USCS § 2344

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought:

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

49 U.S.C. § 10328(a)

(a) Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.